

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BAO XUYEN LE, as Personal Representative
of the Estate of TOMMY LE; HOAI "SUNNY"
LE; and DIEU HO,

Plaintiffs,

vs.

REVEREND DR. MARTIN LUTHER KING
JR. COUNTY; and KING COUNTY DEPUTY
SHERIFF CESAR MOLINA,

Defendants.

No. 2:18-CV-00055-TSZ

KING COUNTY'S MOTION TO
QUASH AND FOR PROTECTIVE
ORDER

Noted for: January 15, 2021

I. RELIEF REQUESTED

Defendant King County, on behalf of King County Council member Girmay Zahilay, moves for an order quashing his notice of deposition and protecting him from being compelled to testify at a deposition in this case due to testimonial privilege.

II. FACTS RELEVANT TO MOTION

This federal civil rights and state common law lawsuit arises out of an officer-involved shooting after several King County deputies responded to multiple 911 calls of

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Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION, Litigation Section
900 King County Administration Building
500 Fourth Avenue
Seattle, Washington 98104
(206) 296-0430 Fax (206) 296-8819

1 armed male, later identified as Tommy Le, terrorizing residents in a Burien
2 neighborhood on June 13, 2017. The case has been through a series of iterations,
3 including the dismissal of plaintiffs' claims of racially-motivated selective law
4 enforcement in violation of the Fourteenth Amendment, negligence under respondeat
5 superior, the tort of Outrage, and Reckless or Negligent Infliction of Emotional Distress
6 *See Dkts. #38, 143, 178, 189.*

7
8 Following the original scheduled trial date, the King County Office of Law
9 Enforcement ("OLEO"), at the direction of former OLEO Director Deborah Jacobs,
10 authorized a report about the June 14, 2017 officer-involved shooting.

11 This report was one matter on the agenda of the King County Council Law and
12 Justice Committee on September 2, 2020. The committee consists of seven King County
13 Council members, with council member Zahilay servinging as the chair of the
14 committee. The remarks of Councilman Zahilay (and those of the other council
15 members) at the September 2, 2020 meeting were recorded and videotaped. *Declaration*
16 *of Daniel L. Kinerk, Exhibit 1, King County Council transcript of 9/2/20 hearing.*

17 On October 15, 2020, plaintiffs' counsel sought permission to re-open discovery
18 to conduct additional depositions, including that of Council member Zahilay. *Kinerk*
19 *Dec., Ex. 2, Status Conference transcript, 10/15/2020.* King County objected, indicating that
20 Council member Zahilay did not speak on behalf of the other King County council
21 members or on behalf of King County in his remarks at the committee hearing. *Id.* at
22 23:14-25, 24:1-20. King County further objected to deposing Council member Zahilay as
23 his testimony was collateral to the issues in the case and introduced the risk that the

1 County would need to call other council members to refute Mr. Zahilay's comments. *Id.*

2 The Court stated:

3 ...you will have the opportunity to take Zahilay's deposition
4 on what he said and try and determine or sort out whether
5 anything he said would be in any way binding on the
6 county. But this is discovery. This is not admissibility. And
7 from what I've heard today, it seems highly unlikely that his
8 comments would in any way bind the county, or even be
9 admissible, if it's one council person's views of what a report
10 says.

11 The jury is going to decide whether this was, as I say,
12 excessive force, whether something was improper. And
13 we're not going to have all of the council members coming
14 in to tell us their views.

15 *Kinerk Dec. Ex. 2, 26:6-18.*

16 On October 19, 2020, the Court issued a Minute Entry following the October 15,
17 2020 status conference holding that "plaintiffs may also depose King County Council
18 member Girmay Zahilay regarding the comments he made about or after issuance of
19 the OLEO report." *See Dkt. #246.* The Court also noted that "I can't conceive that this
20 OLEO report would ever be admitted in evidence." *Kinerk Dec., Ex. 2, 25:24-25.* Council
21 member Zahilay's deposition has now been noted for January 21, 2021.

22 The Court's approval of Council member Zahilay's deposition was made without
23 the opportunity for the Court to be fully briefed on the legislative privilege against suit
and testifying in this matter. This motion follows.

24 III. EVIDENCE RELIED UPON

- 25 1. The declaration of King County Council member Girmay Zahilay;
- 26 2. The declaration of Daniel L. Kinerk, with exhibits;

IV. STATEMENT OF ISSUE

Whether the Court should recognize the testimonial privilege afforded a King County Council member operating in his legislative capacity and quash his notice of deposition in this matter? Yes.

V. ARGUMENT

Local legislators are absolutely immune from civil liability for their legislative acts. See *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163 (9th Cir.2005). The legislative immunity doctrine also creates an evidentiary and testimonial privilege. *Suhre v. Board of Comm'rs*, 894 F.Supp. 927, 932 (W.D.N.C.1995), *reversed on other grounds*. Where a legislator is immune from suit for a legislative act, he cannot be called to testify regarding those same actions. See *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D.Md.1992).

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King County Council member Zahilay's remarks regarding the OLEO report were made during a committee meeting. *Declaration of Girmay Zahilay*. The testimonial privilege precludes deposing a legislator about words spoken in that capacity. The testimonial privilege also extends into inquiry into the motivation or purposes of the legislative act. *Id.* citing *U.S. v. Brewster*, 408 U.S. 501, 502, 525, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972). In *Laurel*, plaintiffs sought to depose City Council members regarding two new local ordinances that were adopted by the City Council. The court ruled :

... a legislator shall not be questioned in any place (*to include a deposition*) where the inquiry reaches the legislative acts or motivations for such acts.

Id. at *3. (emphasis added)

In granting defendant's motion to quash and for protective order, the court found that plaintiff's request to depose the council members fell "within the scope of activities considered to be within the legislative sphere."

The situation here is no different. The comments County Council member Zahilay made about the OLEO report were made during a Law and Justice County Council meeting and can only be construed as an activity within the legislative sphere. They are privileged and protect him from be subjected to a deposition. This makes complete sense because if every legislator is subject to a deposition for his legislative activities, his "time, energy and attention" is diverted from his legislative tasks and his legislative independence adversely affected.

The privilege precludes deposing city council members absent extraordinary

1 circumstances, like personal benefit to the legislator, which is not applicable here.

2 *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, (1951).

3 The Ninth Circuit has applied these principles to preclude testimony by
4 individual City Council members concerning their adoption of zoning ordinances. *City*
5 *of Las Vegas v. Foley*, 747 F.2d 1294 (9th Cir. 1984). The underlying policy goal of this
6 immunity is to protect legislators from interference with their legislative duties. See
7 *Dombrowski v. Eastland*, 387 U.S. 82, 84-85, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967).
8

9 Requiring testimony about communications that reflect objective facts related to
10 legislation subject legislators to the same burden and inconvenience as requiring them
11 to testify about subjective motivations, which is clearly forbidden by the cases cited
12 above.

13 In this case, Council member Zahilay's remarks that plaintiffs seek to discover
14 occurred during a council hearing. *Zahilay Dec.* This is exactly the type of legislative
15 action for which that he enjoys complete immunity and equally important, is afforded
16 testimonial privilege.

17 VI. CONCLUSION

18 The Court should grant the motion to quash and for a protective order
19 preventing the deposition of King County Council member Girmay Zahilay due to
20 testimonial privilege for his legislative acts.
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23

1 DATED this 7th day of January, 2021 at Seattle, Washington.

2
3 DANIEL T. SATTERBERG
4 King County Prosecuting Attorney

5 s/Daniel L. Kinerk
6 DANIEL KINERK, WSBA #13537
7 CARLA B. CARLSTROM, WSBA #27521
8 Senior Deputy Prosecuting Attorneys
9 Attorney for King County Defendants
10 King County Prosecuting Attorney
11 500 Fourth Avenue, Suite 900
12 Seattle, WA. 98104
13 (206) 296-8820 Fax (206) 296-8819
14 dan.kinerk@kingcounty.gov
15 carla.carlstrom@kingcounty.gov
16
17
18
19
20
21
22
23

CERTIFICATE OF MAILING AND SERVICE

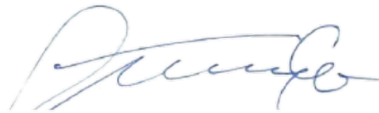
I hereby certify that on January 7, 2021, I electronically filed the foregoing document(s) with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following participants:

Jeffrey M Campiche
Philip G. Arnold
Jeffrey Katz
Attorneys for Plaintiff
CAMPICHE ARNOLD PLLC
111 Queen Anne Avenue North, Suite 510
Seattle, WA 98109
(206) 281-9000
jcampiche@campichearnold.com
parnold@campichearnold.com
jkratz@campichearnold.com

Timothy R. Gosselin
GOSSELIN LAW OFFICE, PLLC
1901 Jefferson Ave., Suite 304
Tacoma, WA 98402
253-627-0684
tim@gosselinlawoffice.com

I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED this 7th day of January, 2021 at Seattle, Washington.



Rafael A. Munoz-Cintron
Legal Assistant
King County Prosecuting Attorney's Office